MOTION FILED

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No. 99-1081

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1999

TOWN OF MULDROW, ET AL.,
Petitioners,

v.

SEQUOYAH COUNTY RURAL
WATER DISTRICT NO. 7,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

MOTION OF THE TEXAS MUNICIPAL LEAGUE AND THE TEXAS CITY ATTORNEYS ASSOCIATION FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

and

BRIEF OF THE TEXAS MUNICIPAL LEAGUE AND THE TEXAS CITY ATTORNEYS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS TOWN OF MULDROW, ET AL.

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MOTION OF THE TEXAS MUNICIPAL LEAGUE AND THE TEXAS CITY ATTORNEYS ASSOCIATION FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTORARI

The Texas Municipal League (TML) and the Texas City Attorneys Association (TCAA) respectfully move this Court for leave to file the accompanying *Amici Curiae* Brief in the case styled *Town of Muldrow, et al. v. Sequoyah County Rural Water District No. 7;* No. 99-1081. The consent of counsel for the Petitioners herein has been obtained and has been filed with this Court on even date herewith. However,

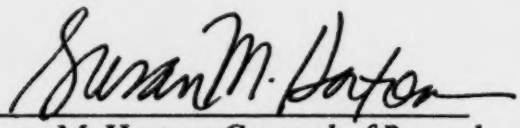
counsel for the respondents herein having heretofore refused to consent to the filing of amicus curiae briefs in this matter, TML and TCAA now file this motion and would respectfully show the Court as follows:

The Texas Municipal League (TML) is a non-profit association of approximately 1,045 Texas cities. Over 13,000 mayors, councilmembers, city managers, city attorneys, and department heads are member officials of the League by virtue of their cities' participation. The Texas City Attorneys Association (TCAA), an affiliate of TML, is an organization of 434 attorneys who represent Texas cities. TML's Legal Defense Program was established to monitor major litigation that affects cities and to file briefs on behalf of cities in cases of special significance to cities.

Amici Curiae urge the Court to grant certiorari in this case to address a federal question of vital importance to cities and towns throughout this country. Since enactment of 7 U.S.C. § 1926(b) in 1961, the provisions therein prohibiting a municipality from encroaching upon the service area of a federally-indebted rural water supply association have been construed by federal courts in manners that have become increasingly threatening to the ability of cities to grow and maintain their financial viability. The ruling of the Tenth Circuit in the instant case extends that construction further than it has heretofore been extended, at a time when cities are experiencing substantial growth and unprecedented demands for city services. *Amici Curiae* believe that the Tenth Circuit's decision in this case is violative of the Tenth Amendment of the United States Constitution and that its application is contrary to the exercise of other laws having the same original purpose as § 1926(b), and respectfully urges the Court to grant Petitioner's application for writ of certiorari.

WHEREFORE, TML respectfully requests that this Court grant this Motion for Leave to File the following *Amici Curiae* Brief.

Respectfully submitted,



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BRIEF OF THE TEXAS MUNICIPAL LEAGUE AND THE TEXAS CITY ATTORNEYS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS TOWN OF MULDROW, ET AL.

INTEREST OF AMICI CURIAE

The Texas Municipal League (TML) is a nonprofit association of 1045 Texas municipalities. Over 13,000 mayors, councilmembers, city managers, city attorneys, and department heads are member officials of TML by virtue of their cities' participation. These officials are responsible for the management and governance of cities in which approximately 79 percent of the population of Texas,

currently estimated to be nearly 20 million people, reside.[1] The TML Legal Defense Program was established to monitor major litigation that affects municipalities and to file briefs on behalf of cities in cases of special interest to municipalities. The Texas City Attorneys Association (TCAA), an affiliate of TML, is an organization of 434 attorneys who represent Texas municipalities.

Pursuant to the Rules of this Court, the consent of counsel for the Petitioners herein has been obtained and has been filed with this Court on even date herewith. However, counsel for the respondents herein having heretofore refused to consent to the filing of amicus curiae briefs in this matter, TML and TCAA file the accompanying motion for leave to file this Amici Curiae Brief.

Amici Curiae urge the Court to grant certiorari in this case to address a federal question of vital importance to cities and towns throughout at least fifteen states in the United States. At issue is expansion of the judicial interpretation of a narrow federal law--7 U.S.C. § 1926(b)--that has become increasingly threatening to the well-being of the cities and citizens in Texas and other states in which numerous rural water supply associations are located. Those states are predominantly the nation's southern and southwestern states.[2]

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[1] "1998 Total Population Estimates for Texas Metropolitan Statistical Areas," http://www.cpa.state.tx.us/ecodata/popdata/popfiles.html; "Texas State Data Center population estimates, 1990 to 1998," http://www.txsdc.tamu.edu/tpepp/1998_txpopest_msa.html. The 1998 population of Texas was estimated to be 19,925,577 persons.

[2] The Southern Municipal Conference, comprised of the municipal leagues of the fourteen southern and southwestern states has identified § 1926(b) as a significant problem in every member state. In response to a survey by the National League of Cities, § 61926(b) was identified as a problem in Indiana as well as the fourteen southern and southwestern states. The states in the Southern Municipal Conference are Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, New

Amici Curiae believe this is an issue of great significance to cities throughout the southern and southwestern United States, and certainly in Texas because of the frequency with which cities encounter rural water supply corporations during the natural process of city growth and expansion, and the extent to which 7 U.S.C. § 1926(b) has been employed to either curtail that growth or to compel affected cities to pay large sums of money in order to grow and provide the services their citizens expect and require.

REASONS FOR GRANTING THE WRIT

A. Section 1926(b), as Interpreted by the Tenth Circuit, is Violative of the Tenth Amendment

Recent decisions of the United States Supreme Court clearly establish that the Tenth Amendment prohibits the federal government from imposing responsibilities upon state officers without the State's consent, from compelling a State to administer a federal regulatory program, and that Congress has other methods besides outright coercion by which it may urge a State to adopt a legislative program consistent with federal interests. *Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992).

In the pending case, the Tenth Circuit has elevated the interest of the Federal Government in protecting its investment in rural water associations to a level that utterly eclipses a State's interest in providing adequate services to its urban citizens, protecting the viability of its cities, and in ensuring adequate protection of the health, safety, and

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Mexico, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, and Virginia.

welfare of its citizens. The City of Muldrow, Oklahoma, according to the Tenth Circuit's decision, is prohibited under § 1926(b) by the federal debt of Sequoyah County Rural Water District No. 7, not only from providing water service in areas outside the city, but to areas inside the city. This is so despite the fact that the city provided water service to some of the disputed areas prior to Sequoyah's federal indebtedness. Furthermore, the Tenth Circuit decision extends the § 1926(b) doctrine further than it has ever been applied by announcing that "[d]oubts about whether a water association is entitled to protection from competition under § 1926(b) should be resolved in favor of the FmHA-indebted party seeking protection for its territory." *Sequoyah Co. Rural Water Dist. No. 7 v. Town of Muldrow,* 191 F.3d 1192, 1197 (10th Cir. 1999).

The history of judicial interpretation of § 1926(b) has been one of conflict between rural and urban interests. From a city perspective, the original intent of the law has been turned on its head. Instead of being utilized to promote the provision of water service to rural areas, it has become a major tool to contain the growth of cities. Cities are unable to expand into adjacent areas, even when the citizens therein request the expansion, when those areas are served by a rural water association that owes money to the federal government. Cities do not even have the option of paying off the debt of the association in order to grow. Instead, the city either loses new development or is required to raise taxes in order to serve its growing population. In essence, judicial interpretation of § 1926(b) is creating greater financial instability within cities than it is relieving within rural areas.

The State of Texas, like other states, has enacted laws authorizing incorporated cities to annex property in order to grow and meet the demands for services that the influx of new population and businesses brings. *See,* TEX. LOCAL

GOV'T CODE ANN. Ch. 43 (Vernon Supp. 2000). Those laws were revised significantly during the 1999 session of the Texas Legislature in order to ensure that cities would supply the levels of city services that their citizens expect and require. The State of Texas has also enacted legislation detailing the procedure that an incorporated city must pursue in order to take over the provision of water and sewer service in a newly annexed area that is currently being served by another utility, such as a rural water association. TEX. WATER CODE ANN. § 13.255 (Vernon Supp. 2000).

The State of Texas has never, however, enacted a law giving its consent to the Federal Government to preempt and eclipse these state laws through the exercise of the § 1926(b) program. That is the effect that § 1926(b) is now having in Texas, however. Populations are swelling and citizens are moving into cities expecting and demanding services. Yet, so long as a rural water association adjacent to a city maintains even a modicum of § 1926(b) debt, the city's only options are either to (1) cease expansion of its tax base, raise taxes within its existing corporate limits in order to provide the necessary new services (thereby driving citizens out of the city and promoting inner-city decay), or (2) pay the water association whatever price the association demands in order to surrender its § 1926(b) claim. Amici Curiae believes the same situation exists in Oklahoma and the other states in which city interests have been rendered submissive to § 1926(b).

Thus, if the Tenth Circuit's decision is allowed to stand, its effect will be the same as that which was found to violate the Tenth Amendment in *Printz* and *New York*. Local and state officers, as well as the state itself, become responsible for protecting the federal government's investment while local and state needs and laws become subservient to the federal government's program, despite the fact that there is

neither a state or local incentive to comply nor state consent for implementation of the federal program.

The citizens who receive water service from the federally-indebted water association are also placed at risk. In most cases, rural water associations own distribution facilities capable of delivering potable drinking water, but lack facilities capable of providing fire protection. *See, e.g., Rural Water System No. 1 v. City of Sioux Center, Iowa,* 29 F. Supp. 2d 975 (N.D. Iowa, 1998, affm'd in part; rev'd in part, ___ F. 3d ___, 8th Cir., No. 98-4160, 99-2005, Jan. 26, 2000). Accordingly, a citizen who desires better fire protection services, or any of the myriad of services cities supply for the protection of the health, safety, and welfare of citizens, and which are not or cannot be supplied by a rural water association, must wish in vain to be annexed, or to otherwise be served by the city, so long as the water association may rely on § 1926(b).

As this Honorable Court is well aware, there was an absence of federal commandeering statutes "until very recent years." *Printz, supra* at 914. Furthermore, this Court's Tenth Amendment analysis of this type of situation was infrequent during the years that the federal government used financial assistance, rather than mandate, to promote states' environmental and utility service programs.

Near the end of those years, a Tenth Amendment argument against the application of § 1926(b) was raised in *City of Madison, Miss. v. Bear Creek Water Ass'n, Inc.,* 816 F.2d 1057, 1060-61 (5th Cir. 1987). Therein, the City's Tenth Amendment argument was rejected and the Fifth Circuit observed that the "characterization of § 1926(b) as resting on Congress's undoubtedly broad powers under the spending clause seems more appropriate to this case than any commerce clause-based argument." (*Garcia* being a Commerce Clause case) *Id.* at 1061.

Since 1987, this Court has provided guidance that was not available to the Fifth Circuit in *Madison,* which relied on *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). The power of Congress pursuant to the spending clause, we now know, is applicable to Tenth Amendment analysis in the sense that Congress may, under its spending power, attach conditions on the receipt of federal funds, thus providing incentive for the state to adopt a legislative program that is consistent with federal interests. *New York, supra* at 168. Under § 1926(b), federal funds are offered not to the state, but to water associations that usually operate as a non-profit or statutorily created corporation.

The *Madison* court was accurate however, in characterizing the relationship of § 1926(b) and the commerce clause as inappropriate for purposes of a Tenth Amendment analysis. *See, Reno, Attorney General, et al v. Condon, Attorney General of South Carolina, et al,* No. 98-1464 (U.S. Jan. 12, 2000), http://caselaw.findlaw.co/US /000/98-1464.html.

Furthermore, the *Madison* court rejected the City's Tenth Amendment argument by reasoning the § 1926(b) does not "permanently curtail the city's authority, because it applies only while the federal debt is outstanding." *Madison* at 1061. The case for which application is now pending, however, clearly demonstrates the fallibility of this reasoning. The Sequoyah Water District received four separate federal loans, three of which originated and were paid off before the controversy between the district and the city arose. Nevertheless, the Tenth Circuit held that the district was entitled to § 1926(b) protection during the pendency of all the loans, so that city encroachment that occurred under a loan that has since been satisfied, as well as city water service initiated before the district's funding under a current loan, is protected. *Sequoyah Co. Rural Water Dist.*

No. 7, supra at 1199, 1200. In other words, the Tenth Circuit's ruling makes clear that a rural water association need only keep a loan alive permanently--whether by extension or a new loan, regardless of the amount of the loan, in order to have permanent protection under § 1926(b).

Amici Curiae urge that the reasons for the *Madison* Court's rejection of a Tenth Amendment argument are no longer viable, and that certiorari should be granted in order that the court may examine § 1926(b) in light of more recent rulings and the constitutional obligation of the Federal Government to leave "to the several States a residuary and inviolable sovereignty." *New York, supra* at 189, citing THE FEDERALIST No. 39, p. 245 (C. Rossiter ed. 1961).

B. The Tenth Circuit's Decision Conflicts With and Will Disrupt Existing and Developing State and Federal Drinking Water Programs, the Goals of Which are Consistent with § 1926(b)

Section 1926(b), enacted in 1961, was an early attempt to promote the supply of drinking water to rural areas and protect the viability of rural water systems. In addition to protecting the federal investment in such systems, Congress's purposes in enacting § 1926(b) has been described as

> 1) to encourage rural water development by expanding the number of potential users of such systems, thereby decreasing the per-user cost, and
> 2) to safeguard the viability and financial security of such associations (and FmHA's loans) by protecting them from the expansion of nearby cities and towns. *Madison, supra* at 1060.

In 1974, Congress enacted the Safe Drinking Water Act (SDWA), and has subsequently amended and reauthorized

the SDWA in order to ensure the safety and adequacy of drinking water supplies in all systems having at least fifteen service connections or serving at least twenty-five individuals. 42 U.S.C. §§ 300f(4)(A); 300g. There are currently about 192,000 water systems in the United States subject to SDWA. J. Bryck, "AWWA White Paper on Viability" p. 1 (American Water Works Association, 1994). Eighty-seven percent of community water systems in the nation serve less than 3300 persons. USEPA, "Safe Drinking Water Act Reauthorization Overview" p. 8 (EPA Publication No. 810/S-94-001, February 1994). In Texas, ninety-four percent of all water systems serve less than 2500 customers. R. Jenson, "The High Cost of Drinking Water" 16 TEXAS WATER RESOURCES INSTITUTE No. 2, (College Station, TX, Summer 1990).

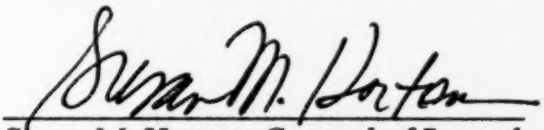
While many small systems are meeting the financial, managerial and technical requirements of the SDWA, others are not. Congress, EPA, states, and water associations are addressing this problem through programs designed to prevent formation of non-viable systems and the elimination of existing non-viable systems. A significant aspect of the viability programs is the ability and authority of a viable system to extend its services into, and to be authorized to provide service to the customers of a non-viable utility.

The goals of the viability programs are consistent with the original intent of § 1926(b), but as interpreted by the Tenth Circuit and other courts, § 1926(b) may now be used to sustain and extend the existence of a non-viable system, while preventing a viable city-operated system from providing service. To foster such inconsistent application of important federal laws through narrow interpretation of a law created for the same purposes as the laws being impinged upon is not sound policy, and should not be further promoted.

CONCLUSION

For the foregoing reasons, the *Amici Curiae* respectfully request the Court to grant the petition for certiorari.

Respectfully submitted,



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